IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA v. **ANGEL M. ACEVEDO-CRUZADO** DEFENDANTS.	Case No. **15-CR-00573-JAG**

DEFENDANT'S RESPONSE IN OPPOSITION TO UNITED STATES' SENTENCING AND RESTITUIOn OF MEMORANDUM

TO THE HONORABLE COURT:

COMES NOW the Defendant Angel M. Acevedo-Cruzado, by and through the undersigned attorney who respectfully states and prays as follows:

I. Introduction

1. On July 7, 2016, pursuant to plea agreement, the defendant pled guilty to count two (2) of the Indictment. (Doc 49).
2. That on September 30, 2016, PSO Aponte file d her Presentence Investigation Report (Doc 54), which was later amended on October 28, 2016, (Doc 57).
3. The Sentencing Hearing was set for November 4, 2016, and was reset for January 9, 2017.
4. That on November 10, 2016, Defendant filed Sentencing Memorandum (Doc 59), which was amended on December 9, 2016, (Doc 66).
5. The Sentencing Hearing originally set for January 9, 2017, was reset for February 10, 2017, which was later continued for March 10, 2017.
6. That on March 9th, 2017 @ 8:42 PM, the Government filed a motion titled United States' Sentencing and Restitution Memorandum. (Doc 70).

7. The defendant opposes the government's sentencing memorandum (Doc 70).

II. PERTINENT FACTS FOR SENTENCING:

First of all Government's Sentencing Memorandum violates the Plea Agreement, (Docket No. 49). Nowhere in the Plea Agreement signed by the parties mentions any restitution, and furthermore, it violates due process, because no evidence was given to the defendant with regards to restitution, nor had the Government ever hinted that it was requesting restitution, therefore in violation defendant's right to make adequate discovery.

Secondly, presenting a Sentencing Memorandum hours before the sentencing hearing, violates this Courts Standing Order as to when and how a party should submit a sentencing memorandum.

Based on the above the court should reject Government's Sentencing Memorandum.

In the alternative, defendant replies as follows and in accordance with his sentencing memorandum:

First, Angel M. Acevedo-Cruzado is not a danger to anyone, and never has been a danger to anyone, nor is he a sex offender as establish by the report that was submitted; on the contrary, the evidence presented makes it clear.

The PSR establishes many good qualities of Angel M. Acevedo-Cruzado, and the defendant request that the court take judicial notice of the PSR, nevertheless the defendant wants to outline the following qualities (18 USCA 3553 (a) (1):

a. He has been a good son, very strong ties with his parents;

b. He is a good sibling;

c. He is a very good father, and no child support payments are in arrears and has the custody of his children;

d. He is loved by his neighbors and friends;

e. He is not a violent person, on the contrary he is a quiet and calm person;

f. He is hard working and an honest person;

g. He lived in a very modest home, with his wife and children;

h. Defendant did not profit, nor did he request payment.

i. The defendant's participation in the instance offense was due to ignorance.

j. When he downloaded the videos and/or images he open only a few and immediately close them and sent then de the delete bin.

   He found no pleasure in the videos and/or images. He does see adult pornography, which is not illegal.

k. The Defendant immediately requested counseling and has been receiving psychiatric treatment. Furthermore, he was examined to determine if he was a pedophile and the report was negative. See attached report.

   All of the above has been confirm by the probation officer.

II. A BRIEF HISTORY OF THE FEDERAL SENTENCING LAW

Federal sentencing law has experienced many changes during the last quarter century. Such change was not always the case. For the better part of the twentieth century, punishment in federal criminal cases was imposed under an indeterminate sentencing scheme, and designed on the premise that defendants convicted for criminal conduct could be rehabilitated and then returned to society with a minimal risk of recidivism. Statutes specified the penalties for crimes, but the sentencing judge had broad discretion to incarcerate a defendant and determine the length of the term of imprisonment, or impose probation or some other form of lesser restraint, and decide whether a fine should be imposed and how much. *See, Mistretta v. United States,* 488 U.S. 361, 363, 109 S.Ct. 647, 650, 102 L.Ed.2d 714 (1989).

Eventually, "[r]ehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases." *Mistretta,* 488 U.S. at 365, 109 S.Ct, at 651. The result of this perception that the federal indeterminate sentencing system had failed was The Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551 *et seq*. and 28 U.S.C. §§ 991-998, which made significant changes to the way sentences were imposed in criminal cases in federal court. Under this watershed legislation, federal judges were required to impose sentences based on the United States Sentencing Guidelines, and falling within the range of the applicable sentencing guideline. *Koon v. United States,* 518 U.S. 81, 92, 116 S.Ct. 2035, 2043-44, 135 L.Ed.2d 392 (1996).

The constitutional viability of the mandatory Sentencing Guidelines began to be questioned in a series of Supreme Court cases beginning with *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and culminating with *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2543, 159 L.Ed.2d 403 (2004) and *United States v. Booker,* 543 U.S.220, 125 S.Ct. 738, 160 L.Ed.2d 621(2005). In *Blakely* the Supreme

Court applied its previous holdings in *Apprendi* and *Jones* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt", to the Washington state sentencing guideline system, which allowed the sentencing judge to increase a defendant's sentence based on judge made findings of fact neither admitted by the defendant nor found by a jury beyond a reasonable doubt. *Blakely, supra,* 542 U.S., at 301, 124 S.Ct., at 2536, *citing, Apprendi,* 530 U.S., at 490, 120 S.Ct., at 2362-63; *see, Jones,* 526 U.S.**,** at 243, n. 6, 119 S.Ct., at 1224, n.6. The Court in *Blakely* found that the state of Washington's sentencing guidelines, violated the Sixth Amendment. *Blakely, supra,* 542 U.S., at 305-08, 124 S.Ct., at 2538-40. In *Booker,* the Court specifically held that the holding in *Blakely* applied to the U.S. Sentencing Guidelines, 543 U.S. at 230-44, 125 S.Ct., at 748-56 (Part One, Stevens, J.). The Court also held that in order to not run afoul of the Sixth Amendment, those portions of the Sentencing Reform Act of 1984 that made the Sentencing Guidelines ***"mandatory,"*** specifically, 18 U.S.C. §3553(b)(1) and § 3742(e), had to be severed and excised. 543 U.S.220, at 244-45, 125 S.Ct. at 756-57 (Part Two, Breyer, J.). Thus, as modified by *Booker*, the Sentencing Guidelines effectively became advisory, requiring a sentencing court to consider the Sentencing Guidelines ranges, but permitting the Court to tailor the sentence in light of other statutory concerns. 543 U.S., at 245-67, 125 S.Ct., at 757-69 (Part Two, Breyer, J.); *accord, United States v. Shelton,* 400 F.3d. 1325, 1330-31 (11th Cir. 2005). Under *Booker,* the sentence ultimately imposed was then subject to appellate review for "reasonableness." 543 U.S. at 260-63, 125 S.Ct. at 765-67.

The Sentencing Guidelines as modified by *Booker* were addressed again by the Supreme Court in several significant subsequent cases, all-concluding that district courts once again have broad discretion when imposing sentences. *See e.g., Rita v. United States,* 551 U.S. 338, 127, S.Ct. 2456, 2465, 166 L.Ed. 2d 406 (2007)(The Supreme Court concluding that appellate courts, ***and only the appellate courts,*** may in fact apply a presumption of reasonableness to sentences imposed in accordance with the Sentencing guidelines; district courts have the authority to impose a sentence *sans* the Sentencing Guidelines "because the case warrants a different sentence regardless [of what the guidelines provide]," as long as the district court properly calculates and considers the Sentencing Guidelines); *United States v. Gall,* 552 U.S. 38, 47-48, 128 S.Ct. 586, 595, 169 L.Ed.2d 445 (2007)(Affirming the authority of sentencing judges in federal court to impose sentences lower, in some cases substantially lower, than provided for in the Sentencing Guidelines.); *Kimbrough v. United States*, 552 U.S. 85, 92-93, 101,128 S.Ct. 558, 564-65, 570, 169 L.Ed.2d 481(2007) (Supreme Court specifically addressing a sentencing judge's decision to impose a lower sentence than recommended by the Sentencing Guidelines based on "the disproportionate and unjust effect that the crack cocaine guidelines have in sentencing," holding that "as a general matter, courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.")

The Supreme Court's most recent substantive discourse on the Sentencing Guidelines post-*Booker* came in *Pepper v. United States,* _____ U.S._____,131 S.Ct. 1229, 179 L.Ed.2d 196 (2011). In *Pepper,* the Supreme Court held that when a defendant's sentence has been set aside on appeal, a district court at re-sentencing may consider evidence of the defendant's post-sentencing rehabilitation, and such evidence may, in appropriate cases, support a downward variance from the now-advisory federal Sentencing Guidelines range. 131 S.Ct. at 1241-42. However, arguably more significant than the primary holding in *Pepper,* was the road traveled in reaching it, and the Court's clarion holding on the purposes of sentencing in federal criminal cases, and the discretion district judges have under the post-*Booker* advisory guidelines.

> ***It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. Underlying this tradition is the principle that the punishment should fit the offender and not merely the crime***... Consistent with this principle, we have observed that both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. In particular, we have emphasized that highly relevant-if not essential-to the selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. Permitting sentencing courts to consider the widest possible breadth of information about a defendant ensures that the punishment will suit not merely the offense but the individual defendant.

Pepper, 131 S.Ct. at 1239-40 (emphasis added). *See also and compare*, *United States v. Alleyne,*_____U.S.____, 133 S.Ct. 2151,_____ L.Ed.2d______, (2013)(Supreme Court reversing enhanced sentence based on judicial fact finding at sentencing by a preponderance of the evidence as opposed to a jury verdict beyond a reasonable doubt, noting however that "[w]e have long recognized that broad sentencing discretion, informed by judicial fact finding, does not violate the Sixth Amendment.").

Thus, although federal sentencing law has not yet come full circle, after *Blakely, Booker, Rita, Gall, Kimbrough, Pepper,* and *Alleyne* the circle is now all but complete. Federal sentencing judges are once again required to sentence a defendant based on his or her individual characteristics as well as for the crime the defendant committed, after making an individualized assessment based on the facts presented, and ***not*** as before, based on the often mindless arithmetic of the Sentencing Guidelines.

Finally, 18 USCA 3553, mandates that "the court shall impose a sentence sufficient, but not greater than necessary…"

III. ANGEL ACEVEDO-CRUZADO SENTENCE

A plea agreement was presented by the parties, and even though this Court is not obligated by the agreement it is the understanding of the undersigned that 57 months is more than sufficient. The defendant committed a lack of judgment, he by mistake downloaded some videos that were only open for a short time, (5-10 minuets) and were place I the trash or deleted icon.

IV. CONCLUSION

THEREFORE, ANGEL M. ACEVEDO-CRUZADO, respectfully requests that the Court to exercise its discretion, and sentence the defendant to the recommended 57 months.

RESPECTFULLY SUBMITTED.

In Bayamon, Puerto Rico, on this 14 day of March 2017.

I HEREBY CERTIFY that on this same date a copy of the preceding document has been electronically filed with the Clerk of the Court using CM/ECF system, which will send notification to all interested parties.

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